

extent, consistent with the efficient performance of the awarded contract.

§ 361.11 Solicitation and awards for legal services.

(a) The Legal Division engages outside counsel primarily to provide legal services for liquidation, conservatorship and receivership activities. Outside counsel is selected on a competitive basis, as defined in the FDIC “Guide for Outside Counsel”, P-2100-002-91 (“Guide”), as amended from time to time.

(b) To be retained as outside counsel, law firms must be free of conflicting interests, unless the Legal Division waives those conflicts in writing. Outside counsel must also enter into a Legal Services Agreement with the FDIC and agree to comply with the provisions of the “Guide”.

(c) The Legal Division actively seeks to engage firms owned by minorities and women, both directly and in association with other firms. The Legal Division’s Minority and Outreach Office provides assistance to minority and women-owned firms, and to minority and women attorneys within other firms, with respect to registration or other matters relating to the retention of outside counsel.

PART 362—ACTIVITIES AND INVESTMENTS OF INSURED STATE BANKS

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AUTHORITY: 12 U.S.C. 1816, 1818, 1819(tenth), 1831a.

SOURCE: 57 FR 53234, Nov. 9, 1992, unless otherwise noted.

§ 362.1 Purpose and scope.

The purpose of this part is to implement the provisions of section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a) which sets forth certain restrictions and prohibitions on the activities and investments of insured state banks and their subsidiaries. In

addition, consistent with the overall purpose of section 24, it is the intent of this part to ensure that activities and investments undertaken by insured state banks or their subsidiaries do not present a risk to either of the deposit insurance funds, are safe and sound, are consistent with the purposes of federal deposit insurance, and are otherwise consistent with law.

[57 FR 53234, Nov. 9, 1992, as amended at 58 FR 64483, Dec. 8, 1993]

§ 362.2 Definitions.

For the purposes of this part, the following definitions apply:

(a) *Activity* refers to the authorized conduct of business by an insured state bank. *Activity* as used in connection with the direct conduct of business by an insured state bank includes acquiring or retaining any investment other than an equity investment. *Activity* as used in connection with the conduct of business by a subsidiary of an insured state bank includes acquiring or retaining any investment.

(b) The phrase *activity permissible for a national bank* shall be understood to refer to any activity authorized for national banks under the National Bank Act (12 U.S.C. 21 et seq.) or any other statute. Activities expressly authorized by statute or recognized as permissible in regulations, official circulars or bulletins issued by the Office of the Comptroller of the Currency or in any order or interpretation issued in writing by the Office of the Comptroller of the Currency will be accepted as permissible for state banks.

(c) An activity is considered to be conducted *as principal* if it is conducted other than as agent for a customer, is conducted other than in a brokerage, custodial, advisory or administrative capacity, or is conducted other than as trustee.

(d) *Bona fide subsidiary* means a subsidiary of an insured state bank that at a minimum:

(1) Is adequately capitalized;

(2) Is physically separate and distinct in its operations from the operations of the bank, however, this requirement shall not be construed to prohibit the bank and its subsidiary from sharing the same facility provided that the area in which the subsidiary conducts

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business with the public is clearly distinct from the area in which customers of the bank conduct business with the bank;

(3) Maintains separate accounting and other corporate records;

(4) Observes separate formalities such as separate board of directors' meetings;

(5) Maintains separate employees who are compensated by the subsidiary, however, this requirement shall not be construed to prohibit the use by the subsidiary of bank employees to perform functions which do not directly involve customer contact such as accounting, data processing and recordkeeping, so long as the bank and the subsidiary contract for such services on terms and conditions comparable to those agreed to by independent entities;

(6) Has no less than a majority of its executive officers who are neither executive officers nor directors of the bank;

(7) Has as a majority of its board of directors persons who are neither directors nor executive officers of the bank; and

(8) Conducts business pursuant to independent policies and procedures designed to inform customers and prospective customers of the subsidiary that the subsidiary is a separate organization from the bank.

(e) *Company* shall mean any corporation, partnership, business trust, association, joint venture, pool, syndicate or other similar business organization.

(f) *Control* shall mean the power to vote, directly or indirectly, 25 per centum or more of any class of the voting stock of a company, the ability to control in any manner the election of a majority of a company's directors or trustees, or the ability to exercise a controlling influence over the management and policies of a company.

(g) *An insured state bank will be considered to convert its charter* if the bank undergoes any transaction which causes the bank to operate under a different form of charter than that under which it operated as of December 19, 1991, however, a change from mutual to stock form shall not be considered to constitute a charter conversion.

(h) *Department* means a division of an insured state bank that:

(1) Is physically distinct from the remainder of the bank;

(2) Maintains separate accounting and other records;

(3) Has assets, liabilities, obligations and expenses that are separate and distinct from those of the remainder of the bank; and

(4) As a matter of state statute, the obligations, liabilities and expenses of which can only be satisfied with the assets of the division.

(i) *Depository institution* means any bank or savings association.

(j) *Equity interest in real estate* means any form of direct or indirect ownership of any interest in real property, whether in the form of an equity interest, partnership, joint venture or other form, which is accounted for as an investment in real estate or real estate joint venture under generally accepted accounting principles or is otherwise determined to be an investment in a real estate venture under Federal Financial Institutions Examination Council Call Report Instructions. The phrase equity interest in real estate does not include the following:

(1) An interest in real property that is used or intended to be used by the insured state bank or its subsidiaries as offices or related facilities for the conduct of its business or future expansion of its business;

(2) An interest in real property that is acquired in satisfaction of debts previously contracted for in good faith or acquired in sales under judgments, decrees or mortgages held by the insured state bank or acquired under deed in lieu of foreclosure provided that the property is not intended to be held for real estate investment purposes and is not held longer than the shorter of any time limit on holding such property set by applicable state law or regulation or the time limit on holding such property that is applicable by statute or regulation for a national bank; and

(3) Interests in real property that are primarily in the nature of charitable contributions to community development corporations provided that the contribution to any one community development corporation does not exceed 2 percent of the bank's tier one capital and the bank's total contribution to all such corporations does not exceed 5

percent of the bank's tier one capital, provided however, that the bank's aggregate investment in such interest may be as great as 10 percent of the bank's tier one capital if its appropriate Federal banking agency has determined that making such investments does not pose a significant risk to the deposit insurance fund. In the case of an insured state nonmember bank, making an aggregate investment in interests in real property that are primarily in the nature of charitable contributions up to a maximum of 10 percent of tier one capital shall not be considered to present a significant risk to the deposit insurance fund.

(k) *Equity investment* means any equity security as defined in §362.2(g); any partnership interest; any equity interest in real estate as defined in §362.2(e); and any transaction which in substance falls into any of these categories even though it may be structured as some other form of business transaction, however, the term *equity investment* shall not include any of the foregoing if it is acquired through foreclosure or settlement in lieu of foreclosure.

(l) *Equity security* means any stock (other than adjustable rate preferred stock and money market (auction rate) preferred stock), certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, or voting-trust certificate; any security immediately convertible at the option of the holder without payment of substantial additional consideration into such a security; any security carrying any warrant or right to subscribe to or purchase any such security; and any certificate of interest or participation in, temporary or interim certificate for, or receipt for any of the foregoing. The term *equity security* does not include any of the foregoing if it is acquired through foreclosure or settlement in lieu of foreclosure.

(m) The phrase *equity investment permissible for a national bank* shall be understood to refer to any equity investment authorized for national banks under the National Bank Act (12 U.S.C. 21 et seq.) or any other statute. Investments expressly authorized by statute

or recognized as permissible in regulations, official bulletins or circulars issued by the Office of the Comptroller of the Currency or in any order or interpretation issued in writing by the Office of the Comptroller of the Currency will be accepted as permissible for state banks.

(n) *Executive officer, director, principal shareholder, related interest, and extension of credit* shall have the same meaning as is relevant for the purpose of section 22(h) of the Federal Reserve Act (12 U.S.C. 375) and §337.3 of this chapter.

(o) *Insured state bank* shall mean any state bank insured by the Federal Deposit Insurance Corporation (FDIC) whether or not a member of the Federal Reserve System.

(p) *Investment in a department* by an insured state bank means any transfer of funds by an insured state bank to one of its departments which is represented on the department's accounts and records as an accounts payable, a liability, or equity of the department except that transfers of funds to the department in payment of services rendered by that department shall not be considered an investment in the department.

(q) *Investment in a subsidiary* by an insured state bank shall mean the total of any equity investment in a subsidiary by an insured state bank, any debt issued by the subsidiary that is held by the insured state bank, and any extensions of credit from the insured state bank to the subsidiary.

(r) *Lower income* means income that is less than or equal to the median income for the area in which the qualified housing project is located as determined by state or federal statistics. The "area" in which a housing project is located shall be understood to refer to the relevant Metropolitan Statistical Area (MSA) in which the project is located if the project is located within an MSA. If the project is not located in a MSA, the median income of the "area" in which the project is located shall be understood to refer to the median income of the state or territory in which the project is located exclusive of the designated MSA's if no state statistics for the local area are available.

(s) *National securities exchange* means a securities exchange that is registered as a national securities exchange by the Securities and Exchange Commission pursuant to section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) and the National Market System, i.e., the top tier of the National Association of Securities Dealers Automated Quotation System (NASDAQ).

(t) *Residents of the state* shall be understood to include companies or partnerships incorporated in, organized under the laws of, licensed to do business in, or having an office in the state.

(u) *Significant risk to the deposit insurance fund* shall be understood to be present whenever there is a high probability that any insurance fund administered by the FDIC may suffer a loss.

(v) *Subsidiary* means any company directly or indirectly controlled by an insured state bank.

(w) *Tier one capital* shall have the same meaning as set forth in Part 325 of this chapter in the case of an insured state nonmember bank and, in the case of an insured state member bank, shall have the same meaning as set forth in regulations defining the term tier one capital as adopted by the bank's appropriate federal banking agency.

(x) *Well-capitalized* shall have the same meaning as is found in §325.103(b)(1) of this chapter, however, for the purposes of applying this definition, the terms *risk-weighted assets*, *total capital*, and *total book assets* shall have the respective meaning prescribed in regulations issued by the appropriate federal banking agency. In order to be considered well-capitalized for the purposes of §362.3(b)(7) and 362.4(c)(2)(i), an insured state bank must meet the above requirements before excluding the bank's investment in its insurance underwriting department and/or its insurance underwriting subsidiary and the bank must be adequately capitalized after such investment is excluded from the bank's capital. The term *adequately capitalized* shall have the same meaning as is found in §325.103(b)(2) of this chapter.

[57 FR 53234, Nov. 9, 1992, as amended at 58 FR 64483, Dec. 8, 1993]

§ 362.3 Equity investments.

(a) *Prohibited investments.* No insured state bank may directly or indirectly acquire or retain any equity investment of a type, or in an amount, that is not permissible for a national bank.

(b) *Exceptions*—(1) *Majority owned subsidiaries.* An insured state bank is not prohibited from acquiring or retaining a majority interest in a subsidiary. If the FDIC denied an application by a Savings Association Insurance Fund (SAIF) member state bank for permission to acquire or retain the majority interest in a subsidiary pursuant to §333.3 of this chapter, this exception does not apply. If the denial concerned an application for permission to retain the investment, the SAIF member state bank must divest its interest in the subsidiary in accordance with whatever conditions and restrictions are set forth in the FDIC's order denying the application.

(2) *Qualified housing projects.* (i) Subject to the limitation contained in paragraph (b)(2)(ii) of this section, an insured state bank is not prohibited from investing as a limited partner in a partnership the sole purpose of which is direct or indirect investment in the acquisition, rehabilitation, or new construction of a qualified housing project. A qualified housing project shall be understood to mean residential real estate intended to primarily benefit lower income persons throughout the period of the bank's investment including but not necessarily limited to any project eligible for the low income housing tax credit under section 42 of the Internal Revenue Code (26 U.S.C. 42). A residential real estate project that does not qualify for the tax credit under section 42 of the Internal Revenue Code may be considered primarily for the benefit of lower income persons if 50 percent or more of the housing units are to be occupied by lower income persons. A real estate project that does not qualify for the tax credit under section 42 of the Internal Revenue Code will be considered residential despite the fact that some portion of the total square footage of the project is utilized for commercial purposes provided that such commercial use is not the primary purpose of the project.